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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-377

ED CAMPBELL, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

JAMES & PRICE
JIMMY JAMES
620 Houston Bar Center Bldg.
Houston, Texas 77002
227-8191

Counsel for Petitioner

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

The Petitioner, ED CAMPBELL, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals entered in this proceeding on April 12, 1972.

OPINION

The opinion of the Texas Court of Criminal Appeals, an original submission of the cause not yet reported, appears in the appendix hereto. No written opinion accompanied the Court's order overruling the Petitioner's Motion for Rehearing which was overruled by order of the Texas Court of Criminal Appeals on June 14, 1972.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered and delivered on April 12, 1972. A timely petition for rehearing was denied on June 14, 1972, and this Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether or not a state bribery statute that includes in its coverage any person acting for or in behalf of the State, any board, commission, agency or department thereof, any county, school district, city or town, or any political subdivision or municipal corporation is unconstitutionally broad by failure to exclude officials such as clerical officers or deputies.

2. Whether or not a state bribery statute that defines a bribe or "any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or the promise of either, bestowed or promised for the purpose of influencing an officer or other person, such as are named in this chapter, in the performance of any duty, public or official, or as an inducement to favor the one offering the same, or some other person" is so vague and indefinite as to be unconstitutional.

STATUTORY PROVISIONS INVOLVED

Article 158, Texas Penal Code (1957):

"Art. 158. 174,125 Bribery of certain officers

Whoever shall bribe or offer to bribe any executive, legislative or judicial officer after his election or appointment, and either before or after he shall

have qualified or entered upon the duties of his office or any person employed by or acting for or on behalf of the State of Texas, any board, commission, agency or department thereof, any county, school district, city or town, or any political subdivision or municipal corporation whatsoever, with intent to influence his act, vote, decision, judgment or recommendation on any matter, question, cause, contract or proceeding which may be then pending, or which may thereafter be brought or come before such person in his official capacity, or in his place, agency or position of employment, or do any other act or omit to do any other act in violation of his duty as an officer, or as such employee or agent, shall be guilty of bribery and shall be confined in the penitentiary not less than two nor more than five years, or be confined in jail for not less than one month nor more than two years, or be fined not less than Five Hundred Dollars nor more than Five Thousand Dollars, or by both such fine and imprisonment. As amended Acts 1957, 55th Leg., p. 1241, ch. 411, § 1."

Article 159, Texas Penal Code (1957):

"Art. 159. 175,126 Officers accepting bribe

Any legislative, executive or judicial officer, or any employee or agent, or person holding a position of honor, trust or profit with, or any person acting for or on behalf of, the State of Texas, any board, commission, agency or department thereof, any county, school district, city or town, or any political subdivision or municipal corporation whatsoever, who shall accept a bribe, or agree or consent to accept a bribe under an agreement or with an understanding that his act, vote, recommendation, opinion or judgment shall be done, influenced or given in any particular manner or upon a particular side of any

question, matter, contract, cause or proceeding which is or may thereafter be pending, or which may be brought or come before him in his official capacity, or in his place, agency or position of employment, or, in his position of honor, trust or profit, or that he shall make any particular nomination or appointment, or shall do any other act, or omit to do any act, in violation of his duty as an officer, or his position, agency or employment shall be guilty of bribery and shall be punished as is provided in Section 1 of this Act; or any such person who shall ask, solicit or offer to accept a bribe with the intent or for the purpose of influencing his act, decision, vote, opinion or recommendation, on any question, matter, nomination, cause, proceeding or contract which may at any time be pending, or which may be brought or come before him in his official capacity, or in his employment, agency or place or position of honor, trust or profit shall be guilty of bribery and shall be confined in the penitentiary not less than two nor more than ten years, or be fined not less than Five Hundred Dollars nor more than Five Thousand Dollars; or by both such fine and imprisonment. As amended Acts 1957, 55th Leg., p. 1241, ch. 411, §2."

Article 177, Texas Penal Code (1925):

"Art. 177. 193,144 'Bribe'

By a 'bribe' as used throughout this Code, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or the promise of either, bestowed or promised for the purpose of influencing an officer or other person, such as are named in this chapter, in the performance of any duty, public or official, or as an inducement to favor the one offering the same, or some other person."

STATEMENT OF THE CASE

The Petitioner worked for the Tax Department, City of Houston, and appraised property for tax purposes. (R. 398) He purchased a used station wagon from John Short Motor Co., Inc. (R. 68-70) and, subsequently, prior to taking an out-of-state trip, returned the car to the motor company for some needed repairs. (R. 77-78) The bill for the repairs amounted to $495.55, (R. 93) which was higher than anticipated. After his return from his trip, Petitioner talked to John Short, owner of the motor company, about the bill due and the tax evaluation of property belonging to the motor company. (R. 96-98) According to Short, Petitioner offered to re-evaluate for tax purposes the property, provided that the repair bill was cancelled. (R. 16)

The Petitioner was tried before a jury and found guilty of the offense of solicitation of a bribe. Punishment was assessed by the jury at one year in the county jail and a fine of $5,000.00.

REASON FOR GRANTING THE WRIT

1. The decision below sustaining the applicability of the Texas bribery statute to any employee of a city who solicits a bribe with the intent to influence such person's conduct or decisions on matters pending before such person by virtue of his official employment, is inconsistent with the applicable decisions of this Court.

One of the chief problems with the enforcement of bribery statutes lies with the statutory indefiniteness of provisions delineating the offense and naming parties

punishable for its commission. A statute such as Art. 159 of the Texas Penal Code does not allow an exception for positions not rationally within the sphere of state control.

In Article 159, the Legislature has set a net large enough to catch all possible offenders, leaving it to the courts to step inside and say who can be rightfully detained and who should be set at large. See *United States v. Reese*, 92 U.S. 214, 221 (1875). The statute in question, Article 159 of the Texas Penal Code, on its face makes no effort to define the responsibility of the broad class of persons, i.e., all employees of state government, regarding their responsibilities under its various provisions.

While it is agreed that bribery statutes may apply to public officials whether they are appointed or elected, it is fundamentally unfair for the statute in question to extend to mere functionaries such as the Petitioner, whose job description hardly would classify as an official position. See, *Brusnighan v. State*, 86 Ga. App. 340, 71 S.E.2d 698 (1952).

2. The decision below sustaining the applicability of the Texas bribery statute which fails to adequately define a bribe, is inconsistent with the applicable decisions of this Court.

The source of the constitutional requirement of certainty is somewhat obscure. Cases involving the issue of whether a statute is void or unenforceable for indefiniteness are legion. It is clear that criminal convictions emanating from a state court may be reversed on void for vagueness grounds. See *Lanzetta v. New Jersey*, 306 U.S.

451, 453 (1939). There is agreement that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

The unfairness and indefiniteness of the Texas statute defining the term bribery, Art. 177, rests on the fact that it fails to give an adequate warning by virtue of the omission in its statutory language to fix an intelligible standard of criminal conduct.

It is the essence and cardinal aim of due process to minimize the structural vagueness of laws which constitute ultimate power of the society over its members. See Collins, "Unconstitutional Uncertainty—An Appraisal," 40 Cornell L.Q. 195, 196 (1955); Aigler, "Legislation in Vague or General Terms" 21 Mich. L. Rev. 831 (1923); Note, "Constitutional Law, Void for Vagueness: An Escape from Statutory Interpretation," 23 Ind. L.J. 272 (1948). Article 177 fails to meet the required standard of specificity.

CONCLUSION

For these reasons, a writ of certiorari should issue to

review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

JAMES & PRICE

By _____
JIMMY JAMES

620 Houston Bar Center Bldg.
723 Main Street
Houston, Texas 77002
227-8191
Counsel for Petitioner

DATED: August 30, 1972

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Honorable Crawford Martin, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas, counsel for the Respondent. I further certify that all parties required to be served have been served.

_____
JIMMY JAMES
JAMES & PRICE
620 Houston Bar Center Bldg.
Houston, Texas 77002
Counsel for Petitioner

APPENDIX

ED CAMPBELL, Appellant

NO. 44,771

v.

THE STATE OF TEXAS, Appellee

Appeal from HARRIS County

OPINION

This appeal arises out of a conviction for bribery. The punishment assessed, by the jury, was one year in the county jail and a fine of $5,000.

The sufficiency of the evidence is not challenged. Suffice it to say that the appellant worked for the Tax Department, City of Houston, and appraised property for tax purposes. He purchased a used station wagon from John Short Motor Co., Inc. and subsequently, prior to taking an out-of-state trip, returned the car to the motor company for some needed repairs. The bill for these repairs amounted to $495.55, which was higher than anticipated. After his return from his trip, appellant talked to John Short, owner of the motor company, about the bill due and the tax evaluation of property belonging to the motor company offering to re-evaluate for tax purposes the property provided the repair bill was cancelled.

Initially, appellant complains the court erred in granting the State's motion in limine to restrict him from mentioning the civil service hearing and the results thereof. It appears from the motion that following the alleged offense the appellant was fired from his employment. As

a result of a hearing he was reinstated by the Civil Service Commission and moved to another department. During voir dire examination of the jury panel, appellant's counsel inquired of some of the prospective jurors if they had heard the results of the civil service hearing. The motion sought to prevent the defense counsel from further mentioning or eliciting evidence of the same without it first being determined that the same was admissible. The motion was granted. No objection was made or exception taken. No later effort was made to show that it was admissible. Nothing is presented for review. Piraino v. State, 415 S.W.2d 416 (Tex. Cr. App. 1967).

Next appellant urges that the court erred in failing to grant his motion to quash the indictment based on the absence of an allegation that John Short had any authority to act in behalf of John Short Motors, Inc., or that he [the appellant] believed or had reason to believe that John Short possessed such authority.

Assuming, without deciding, that the motion to quash was in proper form, it is observed that appellant was charged and convicted under that portion of Art. 159, Vernon's Ann. P.C., as amended 1957, which provides:

> ". . . ; or any such person (including an employee of a city) who shall ask, solicit or offer to accept a bribe with the intent or for the purpose of influencing his act, decision, vote, opinion or recommendation, on any question, matter, nomination, cause, proceeding or contract which may at any time be pending, or which may be brought or come before him in his official capacity, or in his employment, agency or place or position of honor, trust or profit shall be guilty of bribery. . . ."

The gravamen of the offense charged is the soliciting by appellant of a bribe with the intent or for the purpose of influencing his act, appraisal decision, or recommendation on value for taxation of property of the John Short Motors, Inc. Whether John Short was able to perform as appellant solicited is immaterial and not an essential element of the case required to be proved by the State. Appellant's contention is overruled.

In his third ground of error, appellant claims the court erred in admitting a photocopy of the repair order in question. He does not question the correctness of the copy, but claims that if he had the original the "State should have requested *on the indictment* that the appellant furnish the original" or that a copy would be used. He also advances the theory that if the State had access to the original it should have produced the same rather than a copy.

When the copy was offered the objection was on the basis of the best evidence rule. At the time, appellant had just shown, by the witness Short, the original had been "turned over" to the city's legal department and he didn't know where it was at the present time, but that it and two copies had been used as evidence before the Civil Service Board. The prosecutor stated he did not have the original, that the appellant had a copy as already shown by the testimony and he requested that copy be produced or he would offer the photocopy.

We cannot perceive error under these circumstances in admitting the photocopy.

The appellant also contends the court erred in refusing to allow him to impeach a State's witness by showing he was under indictment.

The witness Krauthamer was not charged with the same offense as the appellant and Art. 38.29, Vernon's Ann. C.C.P., prohibits the impeachment of a witness for an offense with which he has merely been charged and not finally convicted.

Further the record reflects that although the witness had been indicted in a federal court in KANSAS the charges had been "dropped."

There is no merit to appellant's contention.

Complaint is next made that the State improperly sought to impeach defense character witness Solito[1] by using the "Did you know" form of question instead of the classical "Have you heard" form. The record does not support such contention. The prosecutor did use a "Has there been any report made to you" form of question to which there was no objection. Subsequently, when the prosecutor began another question with "Have you heard . . ." appellant objected as follows:

> "Your Honor, we object to his going into extraneous matters and by innuendo referring to other things."

The objection was overruled. Certainly such witness may be asked if he has heard of conduct inconsistent with the good reputation to which he had previously testified. See 52 TEX. JUR. 2d §291, Witnesses, n. 19.

Still further appellant contends the court erred in excluding the testimony of the witness Holmes concern-

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1. Solito was called as a State's witness but on cross examination he testified that appellant's general reputation for honesty and integrity was good. He, thus, became a defense witness as to such subject matter. The State was properly allowed to impeach as to such subject matter.

ing appellant's civil service record. Appellant does not direct our attention to the portion of this voluminous record which he claims would have justified the admission of such evidence. No authorities are cited. We conclude the ground of error is not in compliance with Art. 40.09, § 9, Vernon's Ann. C.C.P. Nothing is presented.

Lastly, appellant contends the "trial court erred in refusing to grant the appellant a motion for a new trial that he might be enabled to obtain a fairer trial." Then he notes in the ground of error that the court once admonished State's counsel not to invade the province of the jury by his questioning; that "there are numerous other such questions"; that appellant should have been convicted on evidence not on the questions asked by the prosecutor. He cites only that part of Art. 2.01, Vernon's Ann. C.C.P., which reads:

> ". . . It shall be the primary duty of the prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. . . ."

The ground of error is multifarious, does not direct our attention to the "numerous other questions" and for a number of reasons does not comport with Art. 40.09, § 9, supra. Nothing is presented for review. See McElroy v. State, 455 S.W.2d 223 (Tex. Cr. App. 1970); Erwin v. State, 463 S.W.2d 13 (Tex. Cr. App. 1971).

The judgment is affirmed.

Onion, Presiding Judge

(Delivered April 12, 1972)